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Ellsberg Prosecutor Tied to Studies of Pentagon Papers' Impact

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LOS ANGELES, Jan. 29—The Government said in court today that it had done many analyses to determine if the national defense had been affected by the disclosure or the Pentagon papers.

Further, a high Justice Department official said that much of the analysis had been done at the behest of the chief prosecutor in the case, David R. Nissen, and that all of the analyses were turned over to Mr. Nissen months ago.

Mr. Nissen has been denying since last spring that he knew of such analyses, but today John L. Martin, chief of the Research and Evaluation Section of the Justice Department's Internal Security Division, told of instance after instance, starting in December, 1971, when such information was sent to Mr. Nissen.

Judge Seems Satisfied

Mr. Martin and J. Fred Buzhardt, general counsel of the Defense Department, were in court today at the request of Federal District Judge William Byrne Jr., who has been trying for months to get from the Defense Department all its studies and correspondence concerning the papers.

Mr. Martin's testimony was taken without the jury, which was sent home Friday until tomorrow.

Today, Judge Byrne appeared satisfied that he had finally got all the analyses and attendant correspondence from the Government, but the defense contended that this was not so.

Charles R. Nesson, a defense attorney, told the judge that the defense would prove that on or about Dec. 13, 1971, a Defense Department analysis of the release of the Pentagon Papers was ordered and that it showed that the national defense had not been affected.

This analysis was not satisfactory to Mr. Nissen and, therefore, on Dec. 22, 1971, more analyses were ordered, the defense said. Mr. Nesson contends that the judge has only been given the analyses based on the Dec. 22 request.

Mr. Nesson said that the analyses that had been given to the judge contained exculpatory material; that is, material that would tend to prove the innocence of Dr. Daniel Ellsberg and Anthony J. Russo Jr.

The materials involved have been submitted to the judge in secret, and it is for him to decide whether they do in fact contain exculpatory evidence. If they do, they must be turned oved to the defense.

Espionage and Theft

Dr. Ellsberg and Mr. Russo are accused of eight counts of espionage and seven counts of theft and bribery in this case. To prove espionage, the Government must first prove that their alleged acts injured the national defense.

The indictment covers the period between March 1, 1969, and Sept. 30, 1970, which is nine months to more than two years before the Pentagon papers were first made public by The New York Times.

The defendants are accused, not of making the papers public, but of stealing them, copying them, having unauthorized possession of them and passing them back and forth to each other and to several other persons.

The law allows that potential as well as actual damage be assessed, so thus far, the thrust of the Government's case has not been toward proving the acts that the two men were indicted for.

Rather, the case has consisted chiefly of testimony by two Army generals that Hanoi could have been helped during the Vietnam war and that, therefore, this country's national defense could have been injured by publication of the Pentagon papers.

The defense position is that the Pentagon papers and the other documents in the case were in reality history and not military documents relating to the national defense, that they were either overclassified or should not have been classified, that the military secrets contained in them were outdated and therefore not relevant, that much of the information in the papers was already in the public domain through newspaper articles and books and that it was not military secrets that the Government was trying to protect by classifying the papers, but rather political secrets, which should have been made public.

Argument of Defense

The dispute over the Government analyses of the impact of the disclosure of the papers on national defense, called "damage reports" in Defense Department jargon, started last April. No one here then knew whether such reports existed, but the defense believed that they did.

The defense contends that much of the content of these secret analyses falls into the category of exculpatory evidence under guidelines set out by the Supreme Court in 1963 in a rape case.

Inthe1963 ruling, a landmark decision, the Court held in Brady v. Maryland that if the prosecution knows facts that would help prove the innocence of the defendant, those facts must be made known to the defendant upon request.

Request by Judge

So upon defense motion, Judge Byrne started asking the Government in April to give hi many and all such studies that it had. They would be submitted to him in secret, he said, and he would study them and then decide whether they were in fact what is called in court "Brady material."

Periodically since then, the judge has asked about the material, and each time he was told by Mr. Nissen that as far as Mr. Nissen knew, no such material existed. Judge Byrne accepted this.